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No. 94-1074

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In the Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS ALLEN PRYTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2252, which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional in that it does not require the government to prove that the defendant knew that the materials at issue depicted minors engaged in sexually explicit acts.

2. Whether the evidence was sufficient to support the jury's finding that petitioner was not entrapped.

3. Whether the evidence was sufficient to support the jury's finding that petitioner possessed the requisite scienter under the child pornography statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A7) is unpublished, but the decision is noted at 35 F.3d 557 (Table). The opinion of the district court is reported at 822 F. Supp. 311.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1994. The petition for a writ of certiorari was filed on December 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional guilty plea in the United States District Court for the District of South Carolina,

petitioner was convicted of receiving child pornography, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to six months' confinement in a halfway house, to be followed by five years' probation. Gov't C.A. Br. 4. The court of appeals affirmed. Pet. App. A1-A7.

1. In early 1992, a pornography distributorship that had been raided and taken over by federal law enforcement officers received a letter containing a self-addressed envelope bearing petitioner's address. Thereafter, the officers mailed to petitioner in his self-addressed envelope a letter that gave petitioner the opportunity to choose five out of 100 categories of sexually explicit videotapes. The letter also provided petitioner with the opportunity to inform the distributorship that he was not interested in such material and wished to be removed from the mailing list. Pet. App. A3-A4.

Petitioner returned the letter showing his selection of the following categories: "animal," "bull," "dogs," "K-9 oldies," and "incest." Purveyors and recipients of child pornography understand that "incest" refers to child pornography. On receiving petitioner's letter, the officers mailed back an order form describing a range of bestiality tapes and, under the category "Incest Video Tapes," seven titles, such as "Lolita Girls and Boy," clearly suggesting child pornography. Pet. App. A4. The description of each of the child pornography tapes stated that the tapes showed youths ranging in age from nine to 16 engaging in sexually explicit conduct. Petitioner promptly ordered and paid for all seven of the child pornography tapes, plus four bestiality tapes. Pet. App. A4; 822 F. Supp. 311, 318 (D.S.C. 1993).

In February 1992, the officers sent several of the child pornography tapes to petitioner. Moments after the delivery of the tapes to petitioner's apartment, postal

inspectors executed an "anticipatory" search warrant for the apartment and seized the tapes. Pet. App. A4. During the search they also found a number of foreign advertisements for child pornography, as well as correspondence indicating that petitioner had expressed an interest in child pornography in connection with another government sting operation. Gov't C.A. Br. 14.

2. Before trial petitioner moved to dismiss the indictment on the ground that the government had entrapped him into receiving child pornography, and that the government's misconduct was so egregious as to violate due process. 822 F. Supp. at 316. In denying the motion, the district court held that petitioner had not been entrapped. *Id.* at 319. The court pointed out that petitioner's initial communication with the pornography distributor was not in response to any advertisement devised by the government. *Id.* at 317-318. Citing *Jacobson* v. *United States*, 112 S. Ct. 1535 (1992), the court also observed that the government had "merely solicited [petitioner's] response using a law enforcement technique which has been specifically approved by the United States Supreme Court." 822 F. Supp. at 318. The court concluded that "[n]othing about the government's contacts with [petitioner] g[a]ve rise to the type of inducement that an ordinary person would not feel free to reject." *Id.* at 317. Petitioner subsequently entered into a conditional plea agreement under which his guilty plea was made "subject to the Court's rulings in regard to the defense of entrapment and the other legal and constitutional issues raised by the facts as stipulated and by the supplemental facts submitted by the [petitioner] and by the briefs and arguments as heretofore submitted." C.A. App. 108.

3. On appeal, petitioner challenged the constitutionality of Section 2252(a)(2) on the ground that it

does not require knowledge of the minority of the performers depicted engaging in sexually explicit acts. The court of appeals rejected that claim, holding that the word "knowingly" in the statute "runs to all substantive elements of the offense." Pet. App. A5.

Petitioner also contended that he had been entrapped by the government into receiving the child pornography. The court of appeals held that "the government's conduct never crossed, nor even approached, the line between solicitation and inducement," and that petitioner's entrapment claim was therefore without merit. Pet. App. A6.

Finally, the court of appeals noted that petitioner "vaguely suggest[ed] in his appellate brief the existence of an issue of the sufficiency of the evidence to find the requisite scienter." Pet. App. A7 n.3. The court did not address that contention, however, pointing out that the claim had been waived by petitioner's guilty plea. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 5-7) that 18 U.S.C. 2252 (a)(2) does not require the government to prove that the defendant knew that the materials at issue depicted minors engaged in sexually explicit acts, and that the statute is therefore unconstitutional. Shortly before the filing of the petition, however, the Court rejected that contention in *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994), which construed Section 2252(a)(2) to require knowledge of the minority of the performer.

2. Petitioner contends (Pet. 7-15) that the evidence was insufficient to support the jury's conclusion that he was not entrapped. The affirmative defense of entrapment has two related elements: (1) government inducement of the crime; and (2) a lack of predisposition on the

part of the defendant. See *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). Neither element was present here.

The government offered petitioner no inducement to purchase the child pornography. The government's initial mailing merely invited petitioner to indicate, by subject matter, the types of sexual material in which he was interested. Petitioner circled the "incest" category, among others, and returned the form. The government then sent petitioner an order form, and petitioner ordered several videotapes whose titles plainly indicated that they depicted children engaged in sexual activity. The government made no attempt to persuade petitioner to purchase child pornography; it simply afforded him an opportunity to do so. In the words of the court of appeals (Pet. App. A6), the government's conduct did not "even approach[] the line between solicitation and inducement."

The evidence also showed that petitioner was predisposed to receive child pornography. A person not so predisposed would have undoubtedly felt free to reject the government's solicitation; indeed, the initial mailing offered petitioner the opportunity to check a box indicating that he was not interested in the solicitation and wished to be removed from the mailing list. Pet. App. A3-A4. Petitioner's ready response to the government's solicitation showed that he was of "a frame of mind such that, once his attention [was] called to the criminal opportunity, his decision to commit the crime [was] the product of his own preference and not the product of government persuasion." *United States* v. *Osborne*, 935 F.2d 32, 38 (4th Cir. 1991).

Petitioner's reliance (Pet. 13-15) on *Jacobson* v. *United States*, 112 S. Ct. 1535 (1992), is unavailing. In *Jacobson*, the government learned that a bookstore had mailed the defendant magazines containing photographs of naked children. The government subsequently mailed

the defendant correspondence from five different government-sponsored sham organizations, as well as from a postal inspector posing as a pen pal. The correspondence began with a "sexual attitude questionnaire," which elicited from the defendant a general interest in "pre-teen sex." The correspondence made references to child pornography and sometimes depicted the senders as "free speech" lobbying organizations and fighters for "the right to read what we desire." Some mailings raised the specter of censorship. After two-and-one-half years on the government mailing list, the defendant was solicited to order child pornography. He answered a letter that described concern about child pornography as hysterical nonsense and decried international censorship. When he later received a catalogue, he ordered a magazine depicting young boys engaged in sexual activities. 112 S. Ct. at 1537-1540.

In holding that the evidence was insufficient to show that Jacobson was predisposed to receive child pornography, this Court explained that the defendant's correspondence was indicative at most of a predisposition to view photographs of pre-teen sex and to promote an anti-censorship agenda, but not of a willingness to commit the crime of receiving child pornography. 112 S. Ct. at 1542. The Court further reasoned that "[t]he evidence that [the defendant] was ready and willing to commit the offense came only after the Government had devoted 2 1/2 years to convincing him that he had or should have the right to engage in the very behavior proscribed by law." *Id.* at 1543. The Court concluded that "[r]ational jurors could not say beyond a reasonable doubt that [the defendant] possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to [the defendant]." *Ibid.*

This case is significantly different from *Jacobson*. Here the government engaged in no campaign to persuade petitioner to purchase child pornography. Nor did it disguise itself as an anti-censorship organization or ask petitioner to purchase child pornography based on principle. Rather, the government simply provided petitioner with a single opportunity to purchase child pornography, and petitioner readily responded to that opportunity.

Nor is petitioner helped by *United States* v. *Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc).* In *Hollingsworth* the defendants placed a newspaper advertisement to sell their unused foreign banking license. An undercover agent answered the advertisement by offering the defendants the opportunity to engage in money laundering. After several months of prodding by the government, the defendants accepted the offer. The court of appeals concluded that the defendants had been entrapped because they "had no prayer of becoming money launderers without the government's aid," *id.* at 1202. The court explained that in its view "[p]redisposition is not a purely mental state, the state of being willing to swallow the government's bait." *Id.* at 1200. Rather, a person who responds willingly to the government's offer may still lack the requisite predisposition if he "is not in a position without the government's help to become involved in illegal activity." *Ibid.*

Under the *Hollingsworth* standard, petitioner was clearly predisposed to commit the crime of which he was

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* Petitioner heavily relies (see Pet. 8-13) on the panel opinion in *United States* v. *Hollingsworth*, 9 F.3d 593 (7th Cir. 1993). The en banc majority's analysis in *Hollingsworth* is largely consistent with the approach taken by the panel in that case.

convicted. Petitioner's ready response to the government's single offer of child pornography indicated that he was prepared to commit the offense whenever the opportunity arose, without any inducement from government agents. Moreover, as the presence in his apartment of foreign advertisements for child pornography attested, petitioner, unlike the defendants in *Hollingsworth*, had the means to commit the charged offense absent any assistance from the government.

3. Petitioner contends (Pet. 15-16) that the evidence was insufficient to support a finding that he possessed the requisite scienter. As the court of appeals held, see Pet. App. A7 n.3, petitioner raised no such claim before the district court, and he waived any challenge to the sufficiency of the evidence by opting to forgo a trial and plead guilty. See *United States* v. *Broce*, 488 U.S. 563, 570 (1989); *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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